APPEAL NO. 031145
FILED JUNE 12, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 8, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that he had disability from October 29, 2002, through the date of the hearing. The appellant (carrier) appealed, contending that the hearing officer erred in reopening the record to take official notice and apply information from certain medical texts. The claimant responded, urging affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable low back injury in 1995, and that he was receiving ongoing treatment for that injury. The claimant testified that he sustained a new injury to his low back on _____, when he lifted a bucket full of oil. The claimant testified that he experienced an immediate sharp pain. The claimant explained that this new pain was different and more severe than the pain he experienced from a prior 1995 injury, which he described as a soreness. The claimant testified that he has been unable to work as a result of this new injury from October 29, 2002, through the date of the hearing.

Medical records from 1995 through the claimant's most recent treatment were presented into evidence. The medical records indicate that the claimant was doing better prior to _____. Of note were three MRIs. The first MRI was taken on August 17, 1995, and indicated that "At the L3-4 level there is very mild posterolateral protrusion of disc that is not significantly encroached upon the neural foramen." The second MRI was taken on October 30, 1996, and it does not specifically address the L3-4 level. The third MRI was taken on June 3, 2002, and it indicated "At L3-4 there is also early disc degeneration, a posterior central radial annular tear, without associated disc protrusion or extrusion and minimal hypertrophy of the posterior ligamenta flava and synovia of the respective articular facets. Moderate degree of central spinal canal stenosis is present due to the above changes."

At the start of the proceedings, the hearing officer took official notice of Dorland's Illustrated Medical Dictionary. On April 10, 2003, after the record had been closed, the hearing officer sent the carrier's attorney an e-mail, which read:

> In the [claimant's] CCH Tuesday afternoon in (city), I took official notice of Dorland's Illustrated Medical Dictionary. After reading some of the exhibits, I have discovered that I am going to need to consult The Merck Manual and our anatomical charts book in order to understand some of

this medical stuff. Ergo, this message is to let you know that I am taking official notice of the manual and the charts in addition to the dictionary.

The file contains no indication that the carrier responded or objected in any way.

On appeal, the carrier asserts that the hearing officer committed reversible error by taking official notice of The Merck Manual and The World's Best Anatomical Charts after the record had already closed, thereby denying it due process. The carrier further asserts that the hearing officer erred by applying dictionary definitions to medical terms in reaching his ultimate decision. We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). It appears from the record before us that the hearing officer based his decision upon the medical records properly admitted into evidence, and not upon the objected-to materials. The medical records support the hearing officer's determinations. As such, we decline to reverse the hearing officer's determinations solely because he improperly consulted materials not admitted while the record was open. Furthermore, we note that the carrier took no action until it received the adverse decision of the hearing officer, despite having notice of what he intended to do.

Whether the claimant sustained a compensable injury and had disability were factual questions for the hearing officer to resolve. Injury and disability determinations can be established by the claimant's testimony alone, if believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. Nothing in our review of the record indicates that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order is affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RUSSELL RAY OLIVER
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Edward Vilano
Appeals Judge